



New South Wales

Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Criminal Assets Recovery Act 1990* (the *Principal Act*) to provide for unexplained wealth orders as a means of recovery of criminal assets by the NSW Crime Commission (in addition to assets forfeiture orders and proceeds assessment orders). An unexplained wealth order (like a proceeds assessment order) requires the Supreme Court to order a person who has engaged in serious crime related activity (or who has obtained illegally acquired property from the activities of such a person) to pay the Treasurer an amount equal to the value of the person's current or previous illegally acquired wealth. The main features of the proposed unexplained wealth order provisions are as follows:

- (a) The NSW Crime Commission may apply for an unexplained wealth order or a proceeds assessment order (or for both, in which case the Court is to make whichever of the orders requires the payment of the greatest amount).
- (b) The Court is required to make an unexplained wealth order against a person if there is a reasonable suspicion that the person has at any time engaged in a serious crime related activity. A serious crime related activity is the commission of any offence with a maximum penalty of 5 years or more (such as a drug offence, a serious assault or homicide, theft, tax evasion or

intentional damage to property of more than \$500 in value), whether or not the person has been charged with the offence and (if charged) whether or not the person has been convicted or acquitted.

- (c) The Court is also required to make an unexplained wealth order against a person who has at any time acquired any property derived from the serious crime related activity of another person (whether or not the person against whom the order is made knew or suspected that the property was derived from illegal activities).
- (d) The amount required to be paid by an unexplained wealth order is the total value of all the current and previous wealth of the person against whom the order is made, less any wealth that the person can establish was not illegally obtained. The assessment of the unexplained wealth of a person extends to the value of any interest in property owned or under the control of the person, any property previously expended, consumed or otherwise disposed of and any service, benefit or advantage provided to the person or to another at his or her request.
- (e) The Court is given a discretion to refuse to make an unexplained wealth order, or to reduce its amount, if it is in the public interest to do so.

The proposed unexplained wealth order provisions differ in a number of respects from the existing continued provisions relating to proceeds assessment orders, including in the following respects:

- (a) The Court is required to make a proceeds assessment order only if it is satisfied that it is more probable than not that the person has engaged in a serious crime related activity or acquired the proceeds of any such activity from another person (and not just a reasonable suspicion).
- (b) The Court can only make a proceeds assessment order if the relevant serious crime related activity occurred within 6 years of the application for the order (and not just at any time).
- (c) The Court cannot make a proceeds assessment order (on the basis of the acquisition of proceeds of the activity of another) unless the person knew or ought to have known that the proceeds were from some illegal activity. Such an order also cannot be made against a child under 18 years of age.
- (d) The amount required to be paid by a proceeds assessment order is not assessed on an unexplained wealth basis but on the basis of wealth assessed to be derived from any illegal activity within the previous 6 years, including a presumption that wealth is so obtained if it is the difference between total wealth before the illegal activity and total wealth (including expenditure) afterwards.
- (e) The assessment of the amount payable under a proceeds assessment order may include the value of property forfeited or taken into account under another confiscation order under the Principal Act or under related legislation that applies to court orders on conviction (any such assessment is not available for unexplained wealth orders).

- (f) The Court is not given a discretion to refuse to make a proceeds assessment order (or reduce the amount payable) if it is in the public interest to do so.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on the date of assent to the proposed Act.

Schedule 1 Amendment of Criminal Assets Recovery Act 1990 No 23

Schedule 1 [1] includes unexplained wealth orders in the objects of the Principal Act.

Schedule 1 [2], [3], [4], [5], [8] and [12] make consequential amendments on the inclusion of unexplained wealth orders as an alternative to proceeds assessment orders.

Schedule 1 [6] and [7] enable a restraining order to be sought over all the interests in property (and not just specified interests) of a person suspected of deriving proceeds from serious crime related activities as a consequence of the application of the unexplained wealth order provisions to such a person.

Schedule 1 [9] enables the NSW Crime Commission to apply for an unexplained wealth order or a proceeds assessment order (or for both, in which case the Court is to make whichever of the orders requires the payment of the greatest amount).

Schedule 1 [10] ensures that the provision that prevents a proceeds assessment order being made against a child under 18 years of age who merely acquires crime derived property does not also prevent an order from being made against a corporation.

Schedule 1 [11], [13] and [14] (in so far as it inserts proposed section 28C) transfer general provisions relating to proceeds assessment orders so that they also apply to unexplained wealth orders.

Schedule 1 [14] also inserts proposed sections 28A and 28B. Proposed section 28A enables the NSW Crime Commission to apply to the Supreme Court for an unexplained wealth order against a person (the *defendant*) requiring payment of the amount assessed by the Court as the unexplained wealth of the person. The Court must make such an order if it finds that there is a reasonable suspicion that the defendant has at any time engaged in a serious crime related activity or derived wealth from a serious crime related activity of another person. The Court may refuse to make an order or exclude wealth from an order if it thinks it is in the public interest to do so. Proposed section 28B provides for the assessment of the unexplained wealth of a person, which is defined as the total current or previous wealth of the person other than any part of that wealth that the Court is not satisfied on the balance of probabilities is not or was not illegally acquired wealth. The proposed section sets out the things included in the current or previous wealth of a person, including

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property expended, consumed or otherwise disposed of and any service, benefit or advantage provided to the person or to another at his or her request.

Schedule 1 [15] provides that half of the proceeds of unexplained wealth orders and proceeds assessment orders are to be paid to the credit of the Victims Compensation Fund established under the *Victims Support and Rehabilitation Act 1996*. The proceeds are to be calculated after deducting amounts payable under other orders or to the Commonwealth, another State or a Territory or to an authority of the Commonwealth, another State or a Territory.

Schedule 1 [16] enables regulations containing provisions of a savings or transitional nature to be made consequent on the enactment of the proposed Act.

Schedule 1 [17] provides that the amendments made to the Principal Act do not affect existing applications for proceeds assessment orders or restraining orders, and requires proceeds of existing proceeds assessment orders, received after the commencement of the proposed Act, to be paid to the Victims Compensation Fund in accordance with the amended provisions.

First print



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New South Wales

Criminal Assets Recovery Amendment (Unexplained Wealth) Bill 2010

No. , 2010

A Bill for

An Act to amend the *Criminal Assets Recovery Act 1990* with respect to the recovery of unexplained wealth; and for other purposes.

The Legislature of New South Wales enacts:	1
1 Name of Act	2
This Act is the <i>Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010</i> .	3 4
2 Commencement	5
This Act commences on the date of assent to this Act.	6

Schedule 1	Amendment of Criminal Assets Recovery Act 1990 No 23	1
		2
[1] Section 3 Principal objects		3
	Omit section 3 (b). Insert instead:	4
	(a1) to enable the current and past wealth of a person to be recovered as a debt due to the Crown if the Supreme Court finds there is a reasonable suspicion that the person has engaged in a serious crime related activity (or has acquired any of the proceeds of any such activity of another person) unless the person can establish that the wealth was lawfully acquired, and	5 6 7 8 9 10 11
	(b) to enable the proceeds of illegal activities of a person to be recovered as a debt due to the Crown if the Supreme Court finds it more probable than not the person has engaged in any serious crime related activity in the previous 6 years or acquired proceeds of the illegal activities of such a person, and	12 13 14 15 16 17
[2] Section 4 Definitions		18
	Omit “or a proceeds assessment order” from the definition of <i>confiscation order</i> in section 4 (1).	19 20
	Insert instead “, proceeds assessment order or unexplained wealth order”.	21
[3] The whole Act (including the defined expression “interstate proceeds assessment order” in section 4 (1))		22 23
	Omit “interstate proceeds assessment order” wherever occurring.	24
	Insert instead “interstate proceeds assessment or unexplained wealth order”.	25
[4] Section 4 (1), definition of “unexplained wealth order”		26
	Insert in alphabetical order:	27
	<i>unexplained wealth order</i> means an order made under section 28A and in force.	28 29
[5] Sections 9 (5) (c), 10B (4) (a), 10D (1), 16A (2) (c), 20 (1), 22 (8), 29, 30, 31, 31A (1) (a), 31B (1) (a) and (8), 31D (4), 61 (1) and 62 (b)		30 31
	Omit “proceeds assessment order” wherever occurring.	32
	Insert instead “proceeds assessment order or unexplained wealth order”.	33

[6] Section 10A Proceedings for restraining orders	1
Omit section 10A (1). Insert instead:	2
(1) Application for order	3
The Commission may apply to the Supreme Court, ex parte, for a restraining order in respect of specified interests, a specified class of interests, or all the interests, in property of any person (including interests acquired after the making of the order).	4 5 6 7
[7] Section 10A (5) (a) and (b)	8
Omit the paragraphs. Insert instead:	9
(a) in the case of an application in respect of an interest referred to in subsection (1)—the authorised officer suspects that:	10 11 12
(i) the person whose interest is the subject of the application has engaged in a serious crime related activity or serious crime related activities, or	13 14 15
(ii) the person whose interest is the subject of the application has acquired serious crime derived property because of any such activity of the person or of another person, or	16 17 18 19
(iii) the interest is serious crime derived property, and stating the grounds on which that suspicion is based, and	20 21 22
[8] Part 3, Division 2, heading	23
Omit “ Proceeds assessment orders ”.	24
Insert instead “ Proceeds assessment orders and unexplained wealth orders ”.	25 26
[9] Section 26A	27
Insert before section 27:	28
26A Application for proceeds assessment or unexplained wealth order	29
(1) The Commission may apply to the Supreme Court under section 27 for a proceeds assessment order or under section 28A for an unexplained wealth order (or for both).	30 31 32
(2) If the Commission applies for both orders against a person, the Supreme Court cannot make both orders, but is to make the order that requires payment of the greater amount.	33 34 35

(3)	If the Commission applies for only one of the orders, it may before the application is determined extend the application so that it includes an application for the other order.	1 2 3
[10]	Section 27 Making of proceeds assessment order	4
	Omit “person who is 18 years or older” from section 27 (2A).	5
	Insert instead “person (other than an individual who is under the age of 18 years)”.	6 7
[11]	Section 27 (2B), (2C) and (5)–(12)	8
	Omit the subsections.	9
[12]	Section 28 Assessment for proceeds assessment order—illegal activity proceeds	10 11
	Omit “an assessment under section 27” from section 28 (1).	12
	Insert instead “an assessment for a proceeds assessment order under section 27”.	13 14
[13]	Section 28 (6)	15
	Omit the subsection.	16
[14]	Sections 28A, 28B and 28C	17
	Insert after section 28:	18
28A	Making of unexplained wealth order	19
(1)	The Commission may apply to the Supreme Court for an unexplained wealth order requiring a person to pay to the Treasurer an amount assessed by the Court as the value of the unexplained wealth of the person.	20 21 22 23
(2)	The Supreme Court must make an unexplained wealth order if the Court finds that there is a reasonable suspicion that the person against whom the order is sought has, at any time before the making of the application for the order:	24 25 26 27
(a)	engaged in a serious crime related activity or serious crime related activities, or	28 29
(b)	acquired serious crime derived property from any serious crime related activity of another person (whether or not the person against whom the order is made knew or suspected that the property was derived from illegal activities).	30 31 32 33

(3)	A finding under this section need not be based on a reasonable suspicion as to the commission of a particular offence and can be based on a reasonable suspicion that some offence or other constituting a serious crime related activity was committed.	1 2 3 4
(4)	The Supreme Court may refuse to make an unexplained wealth order, or may reduce the amount that would otherwise be payable as assessed under section 28B, if it thinks it is in the public interest to do so.	5 6 7 8
(5)	Engagement in a serious crime related activity or the acquisition of serious crime derived property referred to in subsection (2) extends to engagement in an activity or the acquisition of property before the commencement of this section.	9 10 11 12
28B	Assessment for unexplained wealth order—unexplained wealth	13
(1)	This section applies for the purpose of making an assessment for an unexplained wealth order of the unexplained wealth of a person against whom the order is made.	14 15 16
(2)	The <i>unexplained wealth</i> of a person is the whole or any part of the current or previous wealth of the person that the Supreme Court is not satisfied on the balance of probabilities is not or was not illegally acquired property or the proceeds of an illegal activity.	17 18 19 20 21
(3)	The burden of proof in proceedings against a person for an unexplained wealth order is on the person to prove that the person’s current or previous wealth is not or was not illegally acquired property or the proceeds of an illegal activity.	22 23 24 25
(4)	The <i>current or previous wealth</i> of a person is the amount that is the sum of the values of the following:	26 27
	(a) all interests in property of the person,	28
	(b) all interests in property that are subject to the effective control of the person,	29 30
	(c) all interests in property that the person has, at any time, expended, consumed or otherwise disposed of (by gift, sale or any other means),	31 32 33
	(d) any service, advantage or benefit provided at any time for the person or, at the person’s request or direction, to another person,	34 35 36
	whether acquired, disposed of or provided before or after the commencement of this section and whether within or outside New South Wales.	37 38 39

(5)	In assessing the unexplained wealth of a person, the Supreme Court is not required to consider any current or previous wealth of which the Commission has not provided evidence.	1 2 3
(6)	The value of any thing included as current or previous wealth is:	4
(a)	in the case of wealth that has been expended, consumed or otherwise disposed of—the greater of:	5 6
(i)	the value at the time the wealth was acquired, and	7
(ii)	the value immediately before the wealth was expended, consumed or otherwise disposed of, or	8 9
(b)	in any other case—the greater of:	10
(i)	the value at the time the wealth was acquired, and	11
(ii)	the value at the time the application for the unexplained wealth order was made.	12 13
28C	General provisions applying to proceeds assessment and unexplained wealth orders	14 15
(1)	In assessing the amount payable under an unexplained wealth order, the Supreme Court must deduct the following (but only if those amounts would otherwise be included in the assessment of the amount payable under the order):	16 17 18 19
(a)	the value of any interests in property of the defendant forfeited under another confiscation order under this Act or an interstate assets forfeiture order,	20 21 22
(b)	any amounts paid or payable by the defendant under any previous proceeds assessment order or unexplained wealth order under this Act or any interstate proceeds assessment or unexplained wealth order,	23 24 25 26
(c)	the value of any interests in property of the defendant forfeited under a confiscation order or interstate forfeiture order within the meaning of the <i>Confiscation of Proceeds of Crime Act 1989</i> ,	27 28 29 30
(d)	any amounts paid or payable by the defendant under any drug proceeds order, pecuniary penalty order or interstate pecuniary penalty order within the meaning of the <i>Confiscation of Proceeds of Crime Act 1989</i> .	31 32 33 34
(2)	The Supreme Court may not make a proceeds assessment order or unexplained wealth order in an application that relates wholly to external serious crime related activity, unless it is satisfied that no action has been taken under a law of the Commonwealth or	35 36 37 38

- any other place outside this State (including outside Australia) in relation to the proceeds of the external serious crime related activity. 1
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- (3) For the purposes of subsection (2), an affidavit by an authorised officer that includes a statement that the officer has made due inquiry and is satisfied that no action has been taken under a law of the Commonwealth or any place outside this State (including outside Australia) against any interests in property in relation to the proceeds of the external serious crime related activity is proof, in the absence of evidence to the contrary, of the matters contained in the affidavit. 4
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- (4) The quashing or setting aside of a conviction for a serious crime related activity does not affect the validity of a proceeds assessment order or unexplained wealth order. 12
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- (5) The making of a proceeds assessment order or unexplained wealth order does not prevent the making under Division 1 of an assets forfeiture order based on the serious crime related activity, or on all or any of the serious crime related activities, in relation to which the proceeds assessment order or unexplained wealth order is made. 15
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- (6) The amount a person is required to pay under a proceeds assessment order or unexplained wealth order is a debt payable by the person to the Crown on the making of the order and is recoverable as such. 21
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- (7) If a proceeds assessment order or unexplained wealth order is made against a dead person, subsection (6) has effect before final distribution of the estate as if the person had died the day after the making of the order. 25
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- (8) The net amount recovered under a proceeds assessment order or unexplained wealth order is to be paid to the Treasurer and credited to the Proceeds Account. 29
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- (9) Notice of an application for a proceeds assessment order or unexplained wealth order is to be given to the person against whom the order is sought and any other person required by the regulations to be given notice. 32
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- (10) The absence of a person entitled to be given notice of a proceeds assessment order or unexplained wealth order does not prevent the Supreme Court from making the order. 36
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- (11) The Supreme Court may, when it makes a proceeds assessment order or unexplained wealth order or at any later time, make any ancillary orders that the Court considers appropriate. 39
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(12)	Despite any rule of law, or any practice, relating to hearsay evidence, the Supreme Court may, for the purposes of an application for a proceeds assessment order or unexplained wealth order, receive evidence of the opinion of:	1
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(a)	a member of the NSW Police Force, or	5
(b)	a member of the Australian Federal Police, or	6
(c)	an officer of Customs within the meaning of the <i>Customs Act 1901</i> of the Commonwealth, or	7
		8
(d)	a member or officer of the Commission,	9
	who is experienced in the investigation of illegal activities involving plants or drugs, being an opinion with respect to:	10
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(e)	the amount that was the market value at a particular time of a particular kind of plant or drug, or	12
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(f)	the amount, or range of amounts, ordinarily paid at a particular time for the doing of anything in relation to a particular kind of plant or drug.	14
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		16
[15]	Section 32 Establishment and use of Proceeds Account	17
	Omit section 32 (3) (c). Insert instead:	18
(c)	to the credit of the Victims Compensation Fund established under the <i>Victims Support and Rehabilitation Act 1996</i> —half of the proceeds of proceeds assessment orders or unexplained wealth orders paid to the Proceeds Account (calculated after deducting from the proceeds any amounts payable under paragraph (b) or agreed to be paid to the Commonwealth, another State or a Territory or an authority of the Commonwealth, another State or a Territory), and	19
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[16]	Schedule 1 Savings and transitional provisions	28
	Insert at the end of clause 1 (1):	29
	<i>Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010</i>	30
		31

[17] Schedule 1, Part 5	1
Insert after Part 4:	2
Part 5 Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010	3 4
25 Existing proceeds assessment orders and applications for proceeds assessment orders	5 6
(1) This Act, as in force before the commencement of the <i>Criminal Assets Recovery Amendment (Unexplained Wealth) Act 2010</i> , continues to apply to an application for a restraining order or a proceeds assessment order that was made, but not finally determined, before that commencement.	7 8 9 10 11
(2) Despite subclause (1), the proceeds of any proceeds assessment order made before that commencement that are received after that commencement are to be dealt with under section 32 as in force after that commencement.	12 13 14 15